

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

KASEAME POINTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:99 CV 1398 ERW
	)	DDN
GENE STUBBLEFIELD,	)	
	)	
Respondent.	)	

**REPORT AND RECOMMENDATION**  
**OF UNITED STATES MAGISTRATE JUDGE**

This action is before the court upon the petition of Missouri state prisoner Kaseame Pointer for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b). Petitioner Pointer claims that his constitutional rights were violated by the trial court's submission of a second-degree murder instruction, over the objection of counsel.

Pointer was charged in the Circuit Court of the City of St. Louis with one count of first-degree murder, one count of first-degree assault, and two counts of armed criminal action. The charges arose out of the January 7, 1995, shooting death of James Robinson and the wounding of Keith Macon. At trial, the State presented evidence that two weeks prior to these crimes, Pointer told Robinson that he would kill him. Resp. Exh. A at 336, 414. On the night of the crimes, Pointer saw Robinson and Macon in a parking lot of a liquor store and approached them. An altercation ensued in which Robinson punched Pointer in the mouth. Robinson, Macon and Robinson's girlfriend drove off in their car. About 15 minutes later, as Robinson was parking his car, another car drove up alongside it and fired gunshots into the car, killing Robinson and wounding Macon. Id. at 350-51, 477-82,

The State presented evidence of Pointer's statement to the police that, after the altercation at the liquor store, he went

home, noticed that his right tooth was loose, got mad, and left the house in his sister's car. At one point, he came to a stop and a revolver slid from under the driver's seat onto the floorboard. As he was driving he saw Robinson's car and drove up alongside it. He rolled down his window and they exchanged words. Pointer told the police that he saw Robinson reach to his waistband for an automatic handgun. Pointer then shot into Robinson's car. Id. at 671-73.

Pointer presented the testimony of his mother and a sister that he was at home with them on the evening of the murder except for approximately fifteen minutes during which he went to the liquor store. Id. at 921, 928-30.

Pointer also objected to an instruction on second-degree murder in addition to one on first-degree murder. He argued that, in light of his alibi defense, the jury should only be given the choice of first-degree murder or acquittal, and that the evidence did not support submission of an instruction on second-degree murder. Id. at 991-93. The trial court overruled the objection. Id. at 993. The jury convicted Pointer of second-degree murder and of the other three charges. He was sentenced to consecutive terms of ten years for the murder, five years for the assault, and three years for each of the armed criminal action convictions.

On direct appeal, Pointer argued, among other things, that the trial court violated his due process rights by submitting the second-degree murder instruction to the jury. The Missouri Court of Appeals affirmed the convictions and sentences in a summary opinion. State v. Pointer, 954 S.W.2d 14 (Mo. Ct. App. 1997). Petitioner's motion for post-conviction relief under Missouri Supreme Court Rule 29.15 was denied, and the denial was affirmed on appeal by the Missouri Court of Appeals. Pointer then commenced the present action, again raising his due process instructional-error claim.

To be entitled to habeas relief, petitioner must show that the Missouri courts' adjudication of his federal constitutional claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); see also Penry v. Johnson, 121 S. Ct. 1910, 1918 (2001); Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

## I.

The State first argues that petitioner's claim is not exhausted, and thus not reviewable by this court, because he did not ultimately present it to the Missouri Supreme Court. The State relies upon O'Sullivan v. Boerckel, 526 U.S. 838 (1999), in which the United States Supreme Court held that to exhaust state remedies, a state prisoner must seek the discretionary review of the state supreme court when that review is part of the ordinary and established appellate review process in that state. Id. at 845, 847.

The State's argument is foreclosed by the Eighth Circuit's recent opinion in Dixon v. Dormire, No. 00-1215, 2001 WL 935877 (8th Cir. Aug. 20, 2001). The court there first held that under O'Sullivan Missouri prisoners are required to seek a transfer for discretionary review by the Supreme Court of Missouri before seeking federal habeas review. Nevertheless, the Court held that this rule was not to be applied to Missouri prisoners, such as Pointer here, who bypassed the opportunity to apply for discretionary review before O'Sullivan was decided in reliance on the State's prior and consistent position that the failure to seek such review would not be asserted as a defense to a federal habeas action. Id. at \*5-6.

## II.

The State also argues that Pointer's claim should be denied on the merits. The undersigned agrees. Under Missouri law, second-

degree murder, Mo. Rev. Stat. § 565.025.1,<sup>1</sup> is a lesser-included offense of first-degree murder, id. § at 565.020,<sup>2</sup> because the elements of second-degree murder are a subset of the elements of first-degree murder. State v. Stepter, 794 S.W.2d 649, 652 (Mo. 1990) (en banc). The only added element for first-degree murder is deliberation.

Pointer has not asserted, nor is the undersigned aware of, a federal constitutional right to preclude a trial court from submitting an instruction on a lesser included offense which is supported by the evidence. See Schmuck v. United States, 489 U.S. 705, 716 (1989) (under the Federal Rules, "a lesser included offense instruction is available in equal measure to the defense and to the prosecution"). A review of the trial transcript indicates that here there was sufficient evidence to support a conviction for second-degree murder. See Jackson v. Virginia, 443 U.S. 307, 319 (1979) (the relevant question for a federal habeas court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). A jury could have rationally concluded that after the altercation in the parking lot, Pointer happened upon Robinson's car, exchanged words with him, got angry and shot him with a gun he found in the car, without deliberation. The undersigned, therefore, cannot say that the trial court's decision to include the instruction on second-degree murder, over petitioner's objection, was contrary to, or an unreasonable application of, federal law.

For these reasons,

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<sup>1</sup>A person commits the crime of murder in the second degree if he "[k]nowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person."

<sup>2</sup>A person commits the crime of murder in the first degree if he "knowingly causes the death of another person after deliberation upon the matter."

**IT IS HEREBY RECOMMENDED** that the habeas petition of Kaseame Pointer be denied.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to timely file written objections may result in the waiver of the right to appeal issues of fact.

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**DAVID D. NOCE**  
**UNITED STATES MAGISTRATE JUDGE**

Signed this \_\_\_\_\_ day of October, 2001.